Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

To: The Commission

JOINT PETITION FOR RECONSIDERATION

RUSSELL D. LUKAS
DAVID A. LAFURIA

LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive
Suite 1200
McLean, VA 22102
(703) 584-8678

Attorneys for
Cellular South Licenses, Inc. and
United States Cellular Corporation

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SUMMARY

The Commission is asked to reconsider its rulemaking order by which it amended its so-called interim cap rule so that a state's interim cap amount will be adjusted if a competitive eligible telecommunications carrier ("CETC") serving the state relinquishes its status as an ETC either voluntarily or involuntarily by the revocation or rescission of its designation as an ETC. The effect of the rule change will be to reduce the overall cap on CETC high-cost universal service support in a state when a CETC relinquishes its ETC designation in the state, because the relinquished funding will not be redistributed to other CETCs in the state. The Commission made the policy decision to reclaim the excess funding so that it can be used to support the broadband initiatives recommended by the National Broadband Plan. The Commission must reconsider that decision, rescind its rulemaking order, and take such actions as necessary to correct the errors summarized below.

The Telecommunications Act of 1996 ("1996 Act") empowered the Federal-State Joint Board on Universal Service ("Joint Board"), comprised of federal and state regulators and a consumer advocate, to act independently of the Commission to recommend changes to the universal service rules after notice and opportunity for public comment. In this rulemaking, the Commission implemented the recommendations of its own staff acting under its direction. The Commission bypassed the Joint Board completely in direct violation of the notice-and-comment rulemaking requirements of § 254(a) of the Communications Act of 1934, as amended ("Act").

The notice of proposed rulemaking ("NPRM") stated that the Commission was proposing a rule that would apply when a CETC relinquishes its ETC status, thereby giving up its right to high-cost support that it was eligible to receive. In addition to adopting the rule that it proposed, the Commission adopted a rule that will apply when a CETC becomes *ineligible* to receive high-

cost support because its ETC status is revoked or rescinded. The NPRM did not provide fair notice that the Commission was considering such a rule under the "logical outgrowth" doctrine, as evidenced by the fact that the NPRM did not elicit any comments relating to the revocation of an ETC designation.

The Commission violated both § 553 of the Administrative Procedure Act and § 1.415(a) of its rules by failing to give any consideration to significant comments submitted by parties opposing the proposed rule. Moreover, the Commission's failure to address a constitutional challenge to its proposed rule under both the Taxing and Origination Clauses of Article I violated its constitutional obligation to explicitly consider such a claim on its merits.

The Commission based its decision to amend the interim cap rule solely upon the finding that the rule changes were "consistent" with the Commission's "goal" when it imposed the interim cap on CETC funding.

But the Commission's professed goal when it imposed an emergency, interim cap on high-cost support in 2008 was to "halt the rapid growth of high-cost support that threatens the sustainability of the universal service fund." Capping high-cost support to CETCs serving each state at the level of such support such carriers were eligible to receive in March 2008, on an annualized basis, has proven sufficient to ensure the "sustainability" of the universal service fund. That being the case, there was no reason for the Commission to amend the interim cap rule so that the "overall cap" on CETC support in a state is *reduced* when a CETC relinquishes its ETC status in that state.

The 1996 Act made providing the services that are supported by universal service under § 254(c) of the Act a prerequisite to being eligible for universal service support. Broadband services are not on the list of services supported by high-cost universal service support.

Nevertheless, the Commission decided that relinquished high-cost support should not be redistributed to CETCs providing services supported by universal service, but rather be held in reserve to support broadband services that are currently ineligible for universal service support. Hence, the Commission is effectively misappropriating high-cost support for disbursement to carriers to use to provide a service not supported by universal service.

Under the Commission's identical support rule, for every subscriber line that a CETC serves in an incumbent local exchange carrier ("ILEC") service area, the CETC is entitled to receive the full amount of the universal service support that the ILEC would have received for that customer. Bound by its still-effective identical support rule, the Commission should rescind its new interim cap rules, because reclaiming high-cost support surrendered by a CETC will serve as an additional limitation on the rights of other CETC's to receive the high-cost support to which they are entitled under the identical support rule.

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Cellular South Licenses, Inc. ("Cellular South") and United States Cellular Corporation ("U.S. Cellular"), by their attorneys, and pursuant to § 405 of the Communications Act of 1934, as amended ("Act"), and § 1.429(a) of the Commission's Rules ("Rules"), hereby petition the Commission to reconsider its Order, FCC 10-205, that it released December 30, 2010, in the above-captioned rulemaking. *See High-Cost Universal Service Support*, 52 Communications Reg. (P&F) 147, 2010 WL 4577265 (2010) ("*Corr Wireless II*").[1]

INTRODUCTION

This particular phase of the endless rulemaking in CC Docket No. 96-45, which began fifteen years ago,[2] was the result of an adjudication: the successful appeal that Corr Wireless

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[1] Petitioners will cite to Commission decisions that have not been published in the FCC Record by page and paragraph number of the document released by the Commission. *Corr Wireless II* was summarized in the Federal Register on January 27, 2011. *See* High-Cost Universal Service Support and Federal-State Joint Bd. on Universal Service, 76 Fed. Reg. 4,827 (2011). Accordingly, this joint petition for reconsideration is timely filed. *See* 47 C.F.R. §§ 1.4(b)(1), 1.429(d). Because they filed comments in the proceeding leading to the adoption of the rule changes in *Corr Wireless II*, Cellular South and U.S. Cellular are interested parties to the proceeding with standing to seek reconsideration under § 405(a) of the Act and § 1.429(a) of the Rules.

[2] *Federal-State Joint Board on Universal Service*, 11 FCC Rcd 18092, 18094 (1996) ("*First NPRM*").

Communications, LLC ("Corr Wireless") took from a decision of the Universal Service Administrative Company ("USAC") to recapture universal service support relinquished by competitive eligible telecommunications carriers ("CETCs"). Agreeing that USAC had erred, the Commission issued an adjudicatory "order" which included a holding that the so-called "interim cap rule" could only be amended following a notice-and-comment rulemaking as required by § 553(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(c). *See High-Cost Universal Service Support*, 51 Communications Reg. (P&F) 434, 2010 WL 3484249 (2010) ("*Corr Wireless I*").[3] Accompanying the order in *Corr Wireless I* was a notice of a proposed rulemaking to implement the Commission's adjudicatory decision that universal service support that is surrendered by a CETC should not be redistributed to other CETCs, but be "reserved as a potential down payment on proposed broadband universal service reforms as recommended by the National Broadband Plan ["NBP"]."[4] In effect, the Commission initiated the *Corr Wireless II* rulemaking for the purpose of putting the imprimatur of the APA on a decision to reclaim relinquished CETC support that the Commission had already made and the process of reclaiming the support that USAC had already begun.

Several CETCs, including Cellular South and U.S. Cellular, sought reconsideration of *Corr Wireless I*.[5] Unsurprisingly, considering that the proceeding was an amalgamation of an adjudication with a rulemaking, the Commission was asked to correct serious procedural defects

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[3] *See Corr Wireless I*, at 4-5 (¶¶ 8, 9).

[4] *Id.* at 2 (¶ 1).

[5] *See* Joint Petition for Reconsideration, WC Dkt. No. 05-337 (Oct. 4, 2010) (filed by Corr Wireless, Cellular South, U.S. Cellular, and eight other CETCs) ("Joint Pet."); Petition for Partial Reconsideration of SouthernLINC Wireless and the Universal Service for America Coalition, WC Dkt. No. 05-337 (Sept. 29, 2010) ("SouthernLINC Pet.").

in its decision-making process, including due process and APA violations.[6] In addition, the Commission's decision to reserve funds as a *potential* down payment on funding for yet-to-be-adopted universal service reforms was the subject of a constitutional challenge under both the Taking and Origination Clauses of Article I.[7]

In its rush to amend its interim cap rules in time to recapture approximately $5.4 million in support that Sprint Nextel Corporation ("Sprint Nextel") planned to relinquish effective December 31, 2010,[8] the Commission did not pause to correct its *Corr Wireless I* errors, or to take advantage of its second opportunity to pass on the constitutionality of its actions.[9] In the process, the Commission compounded its *Corr Wireless I* errors, disregarded all opposing comments, and strayed even further from the dictates of the APA that it is bound to follow, as well as the universal service provisions of the Act that it is bound to execute.[10]

ARGUMENT

I. THE COMMISSION VIOLATED § 254(a) BY EXCLUDING THE JOINT BOARD

In *Corr Wireless I*, the Commission acknowledged that a universal service rule that was promulgated by an APA notice-and-comment rulemaking can only be amended by an APA notice-and-comment rulemaking. The Commission did not acknowledge that Congress imposed an additional rulemaking requirement with respect to changes in the Commission's universal service rules.

The Telecommunications Act of 1996 ("1996 Act") established the Federal-State Joint

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[6] *See* Joint Pet. at 8-15, 20-22.

[7] *See* SouthernLINC Pet. at 7-11.

[8] *See Corr Wireless II*, at 4 (¶ 7).

[9] *See* Comments of SouthernLINC Wireless and the Universal Service for America Coalition, WC Dkt. No. 05-337, at 1 (Oct. 7, 2010) ("SouthernLINC Comments").

[10] *See* 47 U.S.C. § 151.

Board on Universal Service ("Joint Board" or "Board") to conduct notice-and-comment proceedings to develop recommended changes to the Commission's universal service regulations. *See* 47 U.S.C. § 254(a)(1). The Joint Board was to possess the same jurisdiction, powers, duties, and obligations as those conferred by law on administrative law judges ("ALJs") under § 3105 of the APA, 5 U.S.C. § 3105.[11] Thus, Congress intended that the Board discharge its duties in an impartial manner[12] and to operate with a high degree of independence from the Commission.[13]

Like all federal-state joint boards established pursuant to § 410 of the Act, the Joint Board was to be composed of three commissioners of the Commission and four state commissioners. *See* 47 U.S.C. § 410(c). However, Congress added an eighth member: a state-appointed utility consumer advocate. *See id.* § 254(a)(1). Congress obviously intended that consumers be represented during the formulation of the Board's recommendations.

Congress specified that the Joint Board would take the lead in recommending the regulatory changes necessary to implement §§ 214(e) and 254 of the Act, which reflect the main

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[11] The 1996 Act required the Commission to institute the Joint Board in accordance with § 410(c) of the Act. *See* 47 U.S.C. § 254(a)(1). Under § 410(c), a joint state-federal board is to "possess the same jurisdiction, powers, duties, and obligations" as a state joint board established by the Commission pursuant to § 410(a). *Id.* § 410(c). A state joint board is to have "all the jurisdiction and powers conferred by law upon an examiner" provided for in § 3105 of the APA. *Id.* § 410(a). APA § 3105 now provides for the appointment of ALJs. 5 U.S.C. § 3105.

[12] The impartiality of ALJs is required by the APA, *see* 5 U.S.C. §§ 554(d), 556(b), 557(d)(1), and expected by the Commission. *See, e.g., Catalina Radio*, 5 FCC Rcd 3710, 3710 (1990).

[13] By equating the Joint Board with an ALJ, Congress evidently intended that the Joint Board exercise the same degree of independence that the APA affords ALJs. Under the APA, ALJs operate as "a special class of semi-independent subordinate hearing officers," *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S 128, 132 (1953), who are, in many respects, "functionally comparable" to federal district court judges. *Butz v. Economou,* 438 U.S. 478, 513 (1978). *See* Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.9, at 99 (3rd ed. 1994) (ALJs "are almost entirely independent of the agencies at which they preside" or "very nearly as independent of federal agencies as federal trial judges are of the Executive Branch").

universal service provisions of the 1996 Act. *See id.* The Joint Board had to complete its initial notice-and-comment proceeding and make its recommendations to the Commission by a statutory deadline of November 8, 1996.[14] Congress made it clear, however, that the Board's authority to recommend changes to the Commission's universal service rules generally, and specifically to recommend modification of the definition of supported services, was to continue after the initial implementation of §§ 214(e) and 254.[15] That is how the Commission understood § 254 in 1996, when it promised to "periodically review, *after obtaining further Joint Board recommendations*, the definition of services supported by universal services mechanisms ... as well as the regulations adopted to implement the universal service mandates of the 1996 Act."[16]

The Joint Board did not give the public the opportunity to comment on whether the Commission should recapture high-cost universal service support relinquished by a CETC. Nor, for that matter, did the Board make a recommendation on the issue. It made its last recommendation on high-cost support on November 19, 2007, when it recommended that comprehensive reforms be made in existing universal service mechanisms, including the revision of the definition of supported services to include broadband Internet service. *See High-Cost Universal Service Support,* 22 FCC Rcd 20477, 20491 (Jt. Bd. 2007). But the Commission

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[14] *See* 47 U.S.C. § 254(a)(1); *First NPRM*, 11 FCC Rcd at 18094.

[15] *See* 47 U.S.C. § 254(a)(2) (after its May 8, 1996, deadline to implement the 1996 Act, "the Commission shall complete any proceeding to implement subsequent recommendations from [the] Joint Board ... within one year after receiving such recommendations"); § 254(b) ("[t]he Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles ...."); § 254(c)(1) ("[t]he Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported ... shall consider the extent to which such telecommunications services ...."); § 254(c)(2) ('[t]he Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported ....").

[16] *First NPRM*, 11 FCC Rcd at 18094 (emphasis added) (footnote omitted).

declined to implement the Board's recommendations in 2008.[17] Consequently, the Board's recommendations for comprehensive reform, including its broadband recommendation, lapsed in 2008 by operation of the Commission's statutory one-year deadline to implement Board recommendations. *See* 47 U.S.C. § 254(a)(2).

The source of the recommendation that the Commission implemented in *Corr Wireless II* was identified when the Commission attempted to justify its preordained conclusion that the overall cap on CETC support in a state should be reduced when a CETC relinquishes its ETC designation in that state:

> Providing the excess support to other [CETCs] in a state would not necessarily result in future deployment of expanded voice service, *much less broadband service.* It could simply subsidize duplicative voice service. On the other hand, reducing the pool of support in a state could enable excess funds from the legacy high-cost program to be used more effectively to advance universal service broadband initiatives, *as recommended by the [NBP]. We concluded, on balance, that the public interest would be better served by taking this interim step to reclaim such support rather than distributing it, particularly as we proceed with broader reforms to transition to a universal service system that promotes broadband deployment more directly.*[18]

The Commission obviously was acting in furtherance of the recommendations of the NBP, which was authored by the FCC staff members of the Omnibus Broadband Initiative Team ("OBIT") that was headed by Blair Levin. The OBIT obviously was neither the Joint Board nor remotely close to the Board's functional equivalent.

By the 1996 Act, Congress empowered a board comprised of federal and state regulators and a consumer advocate, acting independently of the Commission, to put forward universal service recommendations developed after notice and opportunity for public comment. In *Corr Wireless II*, however, the Commission implemented the recommendations of its own staff acting

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[17] *See High-Cost Universal Service Support*, 24 FCC Rcd 6475, 6492 (2008).

[18] *Corr Wireless II*, at 3 (¶ 5) (emphasis added).

under its direction. The Commission bypassed the Joint Board completely in the process of amending its universal services rules in direct violation of the notice-and-comment rulemaking requirements of § 254(a) of the Act.

II. THE COMMISSION DID NOT PROVIDE PRIOR NOTICE AND AN OPPORTUNITY TO BE HEARD ON ITS ETC REVOCATION RULE

When the FCC proposes to change a universal service rule, the APA, § 254(a) of the Act, and § 1.412(a) of the Rules, require the Commission to give notice to interested parties and allow them an opportunity to comment on the proposed rule change. Both the APA and the Rules require that notice of a rule change be given by publication in the Federal Register. *See* 5 U.S.C. § 553(b); 47 C.F.R. § 1.412(a)(1).

The notice of proposed rulemaking ("NPRM") portion of *Corr Wireless I* was summarized in the Federal Register. It gave notice that the Commission was proposing to amend its interim cap rule "so that, if a [CETC] *relinquishes* its ETC status in a state, the cap amount for that state is reduced by the amount of support that the [CETC] was eligible to receive in its final month of eligibility, annualize."[19] The word "relinquish" means "to renounce or surrender (a possession, right, etc.)" or "to give up; put aside or desist from."[20] Thus, according to its own terms, the proposed ETC relinquishment rule would apply when a CETC surrenders or gives up support that it was eligible to receive.

In contrast, the word "revoke" means "to take back or withdraw; annul, cancel, or reverse; rescind or repeal."[21] As summarized in the Federal Register, *Corr Wireless I* provided no notice that the Commission was contemplating a rule change to permit it to adjust the state's

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[19] High-Cost Universal Service Support and Federal-State Joint Bd. on Universal Service, 75 Fed. Reg. 56,494, 56,495 (2010) (emphasis added).

[20] Random House Webster's Unabridged Dictionary 1628 (2d ed. 2001).

[21] *Id.* at 1648.

interim cap amount if the CETC becomes *ineligible* to receive universal service support because its ETC status is *revoked or rescinded.* Yet, the Commission announced the adoption of an ETC revocation rule in the margin of *Corr Wireless II.*[22]

The Commission had to issue a new NPRM before it adopted its ETC revocation rule unless the rule was "a logical outgrowth" of the ETC relinquishment rule that it actually proposed. *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 174 (2007). The object of the "logical outgrowth" doctrine is to ensure that "fair notice" is afforded. *See id.* The doctrine has been described as follows:

> While an agency may promulgate final rules that differ from the proposed rule, a final rule is a logical outgrowth of a proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period. The logical outgrowth doctrine does not extend to a final rule that is a brand new rule, since something is not a logical outgrowth of nothing, nor does it apply where interested parties would have to devine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.[23]

Based on the *Corr Wireless I* NPRM, interested parties would have had no reason to think that a revocation rule was in the offing. The controversy that the Commission adjudicated in *Corr Wireless I* arose from the yet-to-be-implemented "voluntary commitments" of Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") and Sprint Nextel to "surrender" an estimated $530 million in high-cost support over five years as the price they were willing to pay to obtain the Commission's approval to consummate mergers.[24] If they took the Commission at

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[22] *See Corr Wireless II,* at 2 n.10 ('the states interim cap amount will be adjusted if the [CLEC] is no longer eligible to receive universal service support for whatever reason, whether it is a voluntary relinquishment, or state or Commission action to revoke or rescind ETC status").

[23] *Council Tree Communications, Inc. v. FCC,* 619 F.3d 235, 250 (3d Cir. 2010) (quoting *International Union, United Mine Workers of America v. Mine Safety and Health Administration,* 407 F.3d 1250, 1259-60 (D.C. Cir. 2005) (internal quotation marks, brackets, and citations omitted)).

[24] *See Corr Wireless I,* at 1 & n.1 (¶ 1), 2-3 (¶ 4).

its own word,[25] interested parties had no cause to anticipate that the Commission would also adopt a rule that went beyond what was deemed necessary to implement the "voluntary" merger commitments.[26]

As was the case in *Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003), the comments submitted in response to the NPRM demonstrate that the interested parties did not appreciate that the Commission was contemplating the adoption of a rule to permit it to adjust the state's interim cap amount if a CETC becomes ineligible to receive high-cost support because its ETC status is revoked. No commenter addressed the need for such a rule, and the Commission cited no comments that favored its adoption. *See Corr Wireless II*, at 2 n.10 (¶ 5).

One would expect comments on different issues from different sources if the Commission had provided fair notice that it was considering a rule under which a state's interim cap amount would be adjusted when the ETC status of a CETC is revoked. When the ETC designation of a CETC is revoked, the Commission cannot claim that the CETC remains *eligible* for high-cost support, thereby allowing USAC to include the CETC's support in the calculation of the proportional payments to CETCs under the interim cap.[27] Unlike when a CETC relinquishes its ETC status, the revocation of an ETC designation involves a state determination that a CETC is *ineligible* to receive high-cost support.

"When a carrier relinquishes its ETC status," the Commission can rationalize that the

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[25] Cellular South and U.S. Cellular have disputed whether the commitments made by Verizon Wireless and Sprint Nextel can reasonably be characterized as a voluntary exercise of their discretion. *See* Joint Pet. at 17-18.

[26] Because the rule proposed by the Commission was intended to apply when a CETC voluntarily gave up its right to get the high-cost support for which it was otherwise eligible to receive, interested parties were not put on notice that the rule could be expanded to also apply when the right to receive high-cost support was taken away from a CETC upon a finding that it was ineligible to receive such support.

[27] *See Corr Wireless I*, at 5 (¶ 10).

carrier "no longer has any claim to support within that service area."[28] But the revocation of an ETC designation constitutes the imposition of a sanction under state law, which triggers due process protections and the right to judicial review. Thus, when its designation as an ETC is revoked, the CETC retains a claim for high-cost support until the revocation becomes final under state law, or if the revocation is vacated on appeal.

The interests implicated by the Commission's proposed relinquishment rule are vastly different than those that would have been a stake had the revocation rule been proposed. A voluntary relinquishment of ETC status generally would be consensual, non-controversial, and would involve no material governmental or "state" action that could trigger due process protections. As we have seen, a revocation of an ETC designation always entails state action and normally involves an adjudication that could implicate a panoply of legal issues, policy and practical considerations, and due process protections. Thus, the factors that the Commission would have to consider prior to adopting its relinquishment rule would not have subsumed those relevant to its revocation rule.

The ETC revocation rule cannot be considered a *lawful* outgrowth of the proposed ETC relinquishment rule since the Commission had to depart from its jurisdiction to adopt it. The Commission's subject-matter jurisdiction under § 214(e)(4) encompasses its proposed rule on ETC relinquishment, but a rule on ETC revocation goes beyond its jurisdiction to encroach on a matter of state authority. That is because the revocation of a Commission designation of an ETC pursuant to § 214(e)(6) of the Act would constitute a sanction under the APA. *See* 5 U.S.C. § 551(8) & (10)(F). The APA provides, "A sanction may not be imposed ... except within jurisdiction delegated to the agency and as authorized by law." *Id.* § 558(b). Under that

[28] *Corr Wireless I*, at 6 (¶ 12).

provision, the Commission must have an express grant of statutory authority to impose a sanction for the conduct of regulated entities. *See American Bus Ass'n v. Slater*, 231 F.3d 1, 6 (D.C. Cir. 2000). Congress has not expressly authorized the Commission to revoke a § 214(e)(6) designation.[29]

By § 214(e)(2), Congress granted state commissions the primary authority to make ETC designations. *Federal-State Joint Board on Universal Service*, 15 FCC Rcd 15168, 15175 (2000). However, the authority of state commissions to designate ETCs is not derived from § 214(e), as Congress recognized when it empowered the Commission to designate ETCs in states where telecommunications carriers that provide telephone exchange service and exchange access service are not subject to the jurisdiction of a state commission. *See* 47 U.S.C. § 214(e)(6). State commissions derive their authority to designate ETCs ultimately from state legislatures. And their authority to impose sanctions on CETCs comes from state law unencumbered by the requirements of the APA. Unlike the Commission, many state commissions, such as the Public Utilities Commission of Nevada, have explicit regulatory authority to revoke an ETC designation.[30] Such commissions would be expected to oppose any attempt by the Commission to influence the exercise of their authority.

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[29] Title II of the Act does not authorize the Commission to revoke authorizations issued under § 214. Congress expressly authorized revocation with respect to Title III licenses. *See* 47 U.S.C. § 312(a). "It is a general principle of statutory construction that when one statutory section includes particular language that is omitted in another section of the same Act, it is presumed that Congress acted intentionally and purposely." *AT&T Corp. v. FCC,* 323 F.3d 1081, 1087 (D.C. Cir. 2003) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 439-40 (2002)). Because Congress declined to provide for revocation either in § 214 or elsewhere in Title II, the presumption is that Congress left the Commission without jurisdiction to revoke an ETC designation made by it pursuant to § 214(e)(6).

[30] *See* Nev. Admin. Code 704.680467 ("[t]he Commission may, upon its own motion or upon receipt of a complaint filed by any person, revoke the designation of a provider of telecommunications service as an [ETC] if the Commission determines, after investigation and a hearing, that the provider of telecommunications service has failed to meet the requirements set forth in NAC 704.680461").

None of the foregoing matters were addressed by commenters responding to the *Corr Wireless I* NPRM. Tellingly, no state commission came forward to protest that the proposed rule would impose a limitation on its authority to revoke a CETC designation by forcing it to consider the impact the revocation would have on the state's interim cap amount. In other words, the content of the record that was generated by the *Corr Wireless I* NPRM demonstrates that interested parties were not afforded fair notice that such weighty matters were at issue.

III. THE COMMISSION VIOLATED THE APA BY NOT RESPONDING TO SIGNIFICANT COMMENTS

Both § 553(c) of the APA and § 1.415(a) of the Rules give interested parties the right to file comments on a proposed legislative rule. *See* 5 U.S.C. § 553(c); 47 C.F.R. § 1.415(a). Subsumed in the right to comment is the expectation that the comment will be considered by the Commission. *See* Charles H. Koch, Jr., *Administrative Law and Practice* § 4.41[3] (2d ed. 1997). Thus, the notice-and-comment rulemaking requirements of the APA and the Rules also obligate the Commission to respond to all significant comments, *see American Civil Liberties Union v. FCC,* 823 F.2d 1554, 1581 (D.C. Cir. 1987), because "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 35-36 (D.C. Cir. 1977). A significant comment is one which, if true, would require a change in the proposed rule. *See, e.g., Louisiana Federal Land Bank Ass'n, FLCA v. Farm Credit Adm.,* 336 F.3d 1075, 1080 (D.C. Cir. 2003). A significant comment also requires a reasoned response from the Commission. *See United States Satellite Broadcasting Co., Inc.,* 740 F.2d 1177, 1188 (D.C. Cir. 1984). In *Corr Wireless II,* the Commission reached its decision by the expedient means of ignoring significant comments opposing its rule change.

The Commission decided to amend its interim cap rule so that a state's interim cap amount would be adjusted if a CETC serving the state loses its ETC status for any reason. *See*

Corr Wireless II, at 2 & n.10 (¶ 5). It found the amendment to be consistent with the purpose of the rule, which allegedly was "to rein in high-cost universal service disbursements for potentially duplicative voice services." *Id.* at 2 (¶ 5). It concluded that the public interest would be better served by reclaiming—rather than redistributing—the support lost by a CETC, because: (1) it would reduce the overall cap on CETC support in a state, *see id.* at 2-3 (¶ 5); (2) providing the excess support to other CETCs in the state "would not necessarily result in future deployment of expanded voice service, much less broadband service," *id.* at 3 (¶ 5); (3) redistributed support "could simply subsidize duplicative voice service," *id.*; and, (4) reducing the state pool "could enable excess funds from the legacy high-cost program to be used more effectively to advance universal service broadband initiatives, as recommended by the [NPB]." *Id.*

Perhaps unnoticed, but certainly unaddressed, by the Commission were the following significant comments put on the record by parties opposing the rule change:

- The Commission's decision would result in substantial decreases in the level of high-cost support in some states and territories, having an adverse effect on consumers in rural and high-cost areas because deployment of wireless networks would be curtailed.[31]

- The Commission was incorrect in claiming that relinquished support would not reduce support flowing to any individual CETC.[32] In fact, the Commission's proposal would have a devastating effect on capped levels of support received by CETCs in many states.[33] Specific data buttressing this point was provided with regard to numerous states.[34]

- Because of the portability of high-cost support among wireless CETCs, there is no basis for the Commission's assumption that redistributed support could

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[31] *See* Comments of the New Mexico Public Regulation Commission, WC Dkt. No. 05-337, at 3 (Oct. 7, 2010); Cellular South, U.S. Cellular *et al.,* Reply Comments, WC Dkt. No. 05-337, at 3-9 (Oct. 21, 2010) ("Joint Reply").

[32] *See Corr Wireless I*, at 10 (¶ 24).

[33] *See* Joint Reply at 5.

[34] *See id.* at 7 (Chart).

result in the subsidization of duplicative voice service.[35]

- The Commission's refusal to redistribute relinquished high-cost support would hinder competitive entry.[36]

- Redistributing reclaimed high-cost support to CETCs would only have a negligible effect on the universal service contribution factor since other forces are putting upward pressure on the high-cost fund.[37]

- Redistributing reclaimed support to remaining CETCs would be at least as effective as reserving the support in promoting broadband deployment.[38]

- The amendment to the interim cap rule was not competitively neutral, because it would further reduce the cap on CETC support, without adopting any corresponding reduction in the ongoing level of support to incumbent local exchange carriers ("ILECs").[39]

- There is no need for the Commission to warehouse reclaimed support for future use, instead of redistributing it to remaining CETCs in a state, because "[t]he cap mechanism is currently structured in such a way that some or all of a relinquished carrier's support may be reclaimed for other purposes."[40] The Commission was given examples showing how this would work in selected states.[41]
- The amendment of § 54.709(b) of the Rules to allow USAC to reserve funds indefinitely violates § 254(b)(5) of the Act[42] and is unconstitutional.[43]

- The are alternative means of repurposing relinquished high-cost support which would have a less drastic effect on funding levels available to remaining CETCs.[44]

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[35] *See* Joint Reply at 9-12.

[36] *See* The Public Service Commission of the United States Virgin Islands, Comments, WC Dkt. No. 05-337, at 6 (Oct. 7, 2010); Joint Reply at 13.

[37] *See* Comments of MTPCS, LLC d/b/s Cellular One, WC Dkt. No. 05-337, at 17-19 (Oct 7, 2010); Joint Reply at 13-14.

[38] *See* Joint Reply at 14-17.

[39] *See id.* at 16-17.

[40] *Id.* at 19.

[41] *See id.* at 19-20.

[42] *See* Comments of the Rural Telecommunications Group, Inc., WC Dkt. No. 05-337, at 4 (Oct. 7, 2010).

[43] *See* SouthernLINC Comments at 4.

[44] *See* Joint Reply at 24-26.

The foregoing comments were significant and deserved a reasoned response from the Commission. The Commission's failure to provide any response to the comments "epitomizes arbitrary and capricious decisionmaking." *Illinois Public Telecommunications Ass'n v. FCC,* 117 F.3d 555, 564 (D.C. Cir. 1997). But the Commission's failure to address the twice-raised and properly-presented constitutional challenge to its new rule also it violates its constitutional obligation to explicitly consider such a claim on its merits. *See Meredith Corp. v. FCC,* 809 F.2d 863, 874 (D.C. Cir. 1987).

IV. THE COMMISSION VIOLATED § 254(b) BY FAILING TO BASE ITS POLICY DECISION ON THE STATUTORY UNIVERSAL SERVICE PRINCIPLES

The plain text of § 254 of the Act mandates that the Commission and the Joint Board "shall" base universal service policies on the seven principles listed in § 254(b)(1)-(7). *See, e.g., Qwest Corp. v. FCC,* 398 F.3d 1222, 1234 (10th Cir. 2005) ("*Qwest II*"). Although the Commission must base its policies on the statutory principles, "any particular principle can be trumped in the appropriate case." *Qwest Corp. v. FCC,* 258 F.3d 1191, 1200 (10th Cir. 2001) ("*Qwest I*"). It may "balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal." *Qwest I,* 258 F.3d at 1200. Nor can it ignore all but one principle enumerated in § 254(b). *Qwest II,* 398 F.3d at 1234.

Alongside of the universal service mandate of the 1996 Act is the statutory directive that local telecommunications markets be opened to competition. *See Alenco Communications, Inc. v. FCC,* 201 F.3d 608, 615 (5th Cir. 2000). The Commission "must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other." *Id.* (emphasis in original).

The Commission conducted its perfunctory rulemaking in *Corr Wireless II* as if it were unbridled by any congressional directives or statutory restrictions. Unsurprisingly, its decision to

amend its interim cap rule: (1) was manifestly not based on any of the statutory universal service principles; (2) plainly violated the decade-old, Commission-adopted principle of competitive neutrality;[45] and (3) flouted the local competition mandate of the 1996 Act.

The Commission based its decision to amend the interim cap rule upon the finding that the rule changes were "consistent" with the Commission's "goal" when it imposed the interim cap on CETC funding in 2008. *Corr Wireless II*, at 2 (¶ 5). The Commission recalls that its goal in 2008 was "to rein in high-cost universal service disbursements for potentially duplicative voice services." *Id.* That is not as we recall it.

In 2008, the Commission adopted the Joint Board's recommendation that it impose an "interim, emergency cap" on the amount of high-cost support that CETCs may receive in order "to rein in the explosive growth in high-cost support disbursements." *High-Cost Universal Service Support*, 23 FCC Rcd 8834, 8834 (2008) ("*Interim Cap Order*"). The Commission found that the continued growth of high-cost support at the rate it experienced from 2001 to 2007 "would render the amount of high-cost support unsustainable and could cripple the universal service fund." *Interim Cap Order*, 23 FCC Rcd at 8844-45. "To avert this crisis," the Commission found it "necessary to place some temporary restraints on the fastest-growing portion of high-cost support, i.e., [CETC] support." *Id.* at 8845. The Commission's goal when it imposed an emergency, interim cap on high-cost support was to "halt the rapid growth of high-cost support that threatens the sustainability of the universal service fund." *Id.* at 8837. Contrary to the Commission's recollection, the fact that high-cost disbursements may have supported "potentially duplicative voice services" in 2008 had absolutely nothing to do with the imposition of the interim cap.

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[45] *See Federal-State Joint Board on Universal Service,* 12 FCC Rcd 8776, 8800-06 (1997).

When the *Interim Cap Order* reached the D.C. Circuit, the court held that "the Commission reasonably interpreted Congress's directive [in § 254(b)(5)] that it 'preserve' universal service as also requiring that it 'sustain' universal service, which, in turn, requires ensuring the sustainability of the fund." *Rural Cellular Ass'n v. FCC,* 588 F.3d 1095, 1102 (D.C. Cir. 2009). After giving the Commission the "substantial deference" it deserves when imposing interim regulations, the court upheld the *Interim Cap Order. Id.* at 1105.

In the *Interim Cap Order,* the Commission determined that capping high-cost support to CETCs serving each state at the level of such support such carriers were eligible to receive in March 2008, on an annualized basis, was sufficient to ensure the "sustainability" of the universal service fund. *See* 23 FCC Rcd at 8834. However, the Commission intended that the interim cap remain in effect only until it adopted comprehensive, high-cost universal service reform. *See id.* at 8845. In effect, the Commission found that capping CETC high-cost support at its March 2008 level would sustain the universal service fund for approximately five months.[46]

As we mentioned, the Commission did not adopt the Joint Board's recommendations for comprehensive high-cost reform in 2008. *See supra* pp. 5-6. Consequently, the interim cap rule has remained in effect since August 1, 2008. Maintaining a cap on CETC high-cost support at the March 2008 level annualized has succeeded in sustaining the universal service fund for the last two and one-half years. The Commission made no findings of fact in *Corr Wireless II* to support the conclusion that *reducing* the "overall cap" on CETC support in a state when a CETC relinquishes its designation is necessary to ensure the sustainability of the universal service fund

[46] Rejecting claims that the cap would not be "truly interim in nature," the Commission predicted in May 2008 that the interim cap would "remain in place only until the Commission adopts comprehensive, high-cost universal service reform." *Interim Cap Order*, 23 FCC Rcd at 8845. It was "satisfied that the interim cap's life will be of limited duration," *id.*, presumably because it was under a statutory deadline to act on the Joint Board's comprehensive reform recommendations by November 19, 2008. *See supra* p. 5.

which was, after all, the goal of the *Interim Cap Order.* Indeed, no reasoned explanation is available to show that recapturing relinquished high-cost support to fund a future broadband initiative, as opposed to redistributing the support to CETCs, is essential to sustaining the universal service fund.

The Commission made no attempt to show that its policy decisions in *Corr Wireless II* were remotely based on any of the § 254(b) principles. Two and one-half years after it imposed the interim cap *only* on CETC support, the Commission cannot repeat the excuse that "rather than departing from the principle of competitive neutrality, as a matter of policy, we instead are temporarily prioritizing the immediate need to stabilize high-cost universal service support." *Interim Cap Order*, 23 FCC Rcd at 8845. If there is any need to further reduce high-cost support disbursements, it should be accomplished in a competitively neutral manner.

It suffices to note that the Commission's professed intent to rein in high-cost disbursements for "potentially duplicative voice services" is wholly inconsistent with the local competition mandate of the 1996 Act. Local competition presupposes duplicative voice services. Moreover, the Commission merely assumed that the redistribution of relinquished support to other CETCs "could" subsidize duplicative voice service rather than the deployment of advanced services, particularly broadband.[47] That assumption is immaterial. The Commission must act to ensure that *both* the universal service and local competition mandates of the 1996 Act are realized.

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[47] Needless to say, promoting the deployment of broadband as recommended by the NBP is not among the § 254(b) principles upon which universal service decisions must be based. In addition, the Commission failed to provide any "data-driven" basis for its speculation that CETCs would use relinquished high-cost support merely to provide duplicative voice services. Because funding received by wireless CETCs is portable (*i.e.*, if a CETC loses a subscriber to another CETC in a given market, then high-cost support goes with the subscriber), the presence of multiple wireless CETCs in a market does not cause any increase in the level of high-cost support.

Finally, we come to the elephant in the room. The statutory principles encompass making access to advanced telecommunications services available. *See* 47 U.S.C. § 254(b)(2), (3) & (6). However, the 1996 Act made providing the services that are supported by universal service under § 254(c) a prerequisite to being eligible for universal service support. *See id.* § 214(e). And in 2003, the Commission declined to add broadband services to the list of services supported by universal service. *See Federal-State Joint Board on Universal Service,* 18 FCC Rcd 15090, 15093-96 (2003). It did so again in 2008. *See supra* p. 6. Consequently, broadband services are still not on the list of services supported by high-cost universal service support. *See* 47 C.F.R. § 54.101(a).[48] Nevertheless, the Commission decided in *Corr Wireless II* that relinquished high-cost support should not be redistributed to CETCs providing services supported by universal service, but rather be held in reserve to support broadband services that are currently ineligible for universal service support.

Whether or not the Commission's decision in *Corr Wireless II* bodes well for Americans in the future is irrelevant. The Commission is effectively misappropriating high-cost support for disbursement to carriers to use to provide a service not supported by universal service. Thus, the Commission amended the interim cap for a purpose that is currently prohibited by § 254(e), a provision that the agency has a duty to execute and enforce. *See* 47 U.S.C. § 151. That duty compels the Commission to reconsider and rescind the rules it adopted in *Corr Wireless II.*

V. THE COMMISSION MUST ABIDE BY ITS IDENTICAL SUPPORT RULE

The Commission's interim cap rule cannot be found in Title 47 of the Code of Federal Regulations. What can be found there is the Commission's identical support rule. Under that

[48] The Commission recently sought comment on whether broadband should be added to the list of services that can be supported by federal universal service support mechanisms. *See Connect America Fund*, FCC 11-13, 2007 WL 466775 (Feb. 9, 2011).

rule, for every subscriber line that it serves in an ILEC service area, a CETC is entitled to receive "the full amount of the universal service support that the [ILEC] would have received for that customer." 47 C.F.R. § 54.307(a)(3). By capping the CETC's high-cost support in 2008, the Commission prevented a CETC from receiving the same amount of support as the local ILEC is provided on a per-line basis.

The imposition of an interim cap in 2008 was flatly inconsistent with the identical support rule, which the Commission clearly hoped to repeal. *See Interim Cap Order,* 23 FCC Rcd at 8844. Consequently, the adoption of the interim cap should have effectuated an amendment to the identical support rule under the "maxim of administrative law" that a second rule that "repudiates or is irreconcilable" with a prior legislative rule must be an amendment of the first rule and "must itself be legislative." *Sprint,* 315 F.3d at 374. Ironically, the interim cap rule is not published in the Code of Federal Regulations, but the repudiated identical support rule is published as if undisturbed by the *Interim Cap Order.*

Two years after the interim cap rule was to sunset, the Commission amended the rule in *Corr Wireless II.* By so doing, the Commission repudiated its identical support rule and once again ran afoul of the *Accardi* doctrine[49] under which a federal agency must respect and enforce its own rules so long as they remain in force. *See United States v. Nixon,* 418 U.S. 683, 695-96 (1974). "Thus, unless and until it amends or repeals a valid legislative rule or regulation, an agency is bound by such a rule or regulation." *American Federation of Government Employees v. FLRA,* 777 F.2d 751, 759 (D.C. Cir. 1985). As a properly-promulgated legislative rule, which remains in effect, the identical support rule has the "binding force of law." *Kelley v. EPA,* 15

[49] *See Accardi v. Shaughnessy,* 347 U.S. 260 (1954) and its progeny. As applied to the Commission, the *Accardi* principle that "agencies must abide by their rules" was expressed as a "precept that lies at the foundation of the modern administrative state." *Reuters Ltd. v. FCC,* 781 F.2d 946, 947 (D.C. Cir. 1986).

F.3d 1100, 1108 (D.C. Cir. 1994).

Bound by its still-effective identical support rule, the Commission should be prohibited from enforcing its interim cap rule. But until it repeals its identical support rule, the Commission should abide by the rule at least to the extent of rescinding the *Corr Wireless II* rules, because reclaiming high-cost support surrendered by a CETC will prevent other CETC's from obtaining the high-cost support they are due under the identical support rule.

CONCLUSION

For all the foregoing reasons, Cellular South and U.S. Cellular respectfully request the Commission to reconsider *Corr Wireless II*, rescind the rules that it adopted, and to take such further actions as are necessary to correct the errors in its decision-making process, conform its policies to the principles set forth in § 254(b), and to bring its rulemaking into compliance with the notice-and-comment requirements of the Act and the APA.

Respectfully submitted,

Russell D. Lukas
David A. LaFuria
LUKAS, NACE, GUTIERREZ & SACHS, LLC
8300 Greensboro Drive, Suite 1200
McLean, VA 22102
703-584-8678

Attorneys for
Cellular South Licenses, Inc. and
United States Cellular Corporation

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